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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 613

O. L. SHANNON,

Petitioner,

vs.

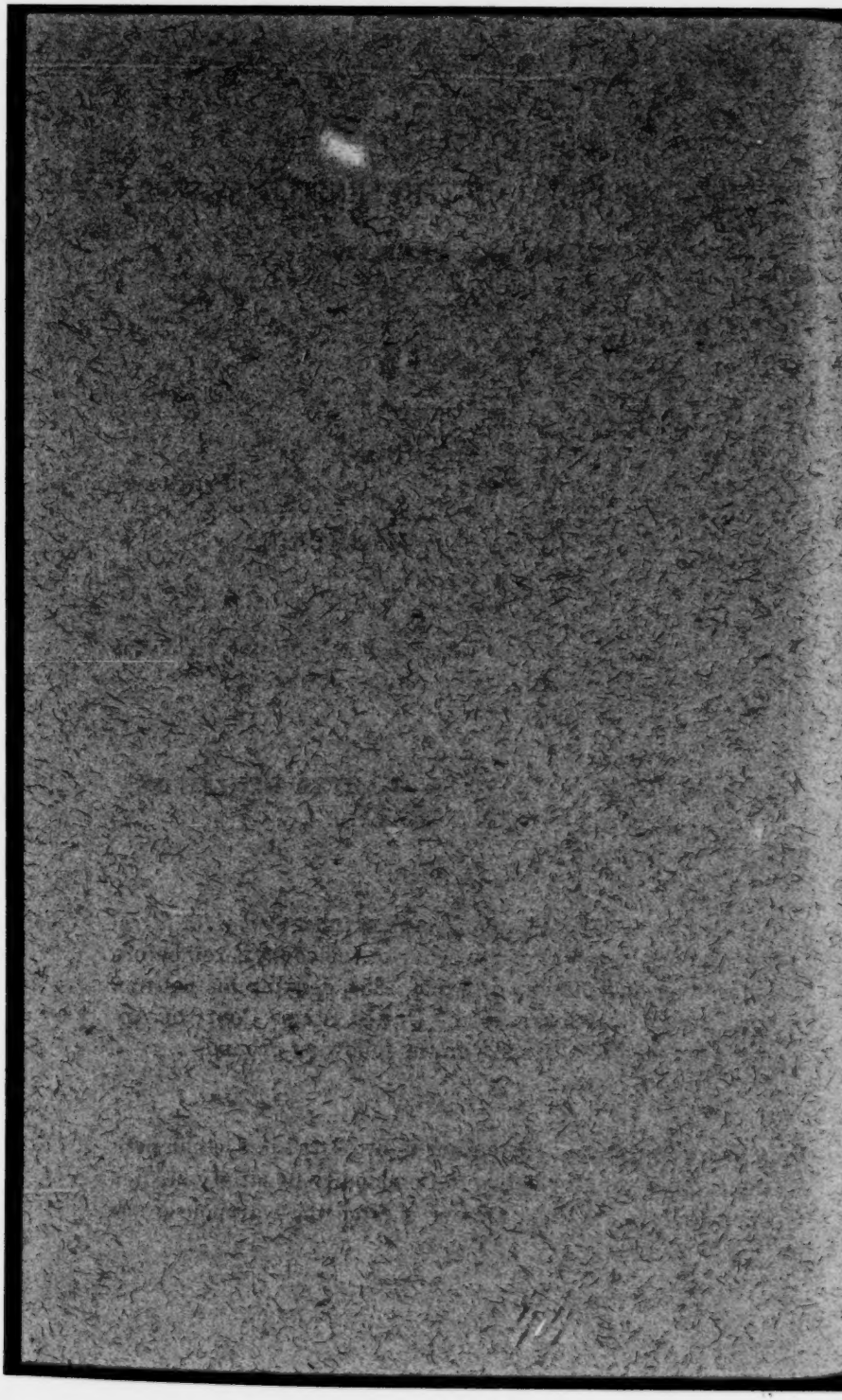
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING AFTER DENIAL OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, O. L. Shannon, respectfully prays for a rehearing and reversal of the order of the court hereinbefore entered on the 26th day of April, 1954, denying his petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, on the following grounds:

I

The governments contention (Gov. Brief p. 8) that petitioner "did not give notice to Commodity to satisfy his lien upon the grain and to remove it from the warehouse, nor

was an attempt made to turn over a cash balance to Commodity after the satisfaction of any warehouseman's lien," is a mere assumption by the writer of the government's brief and is totally unsupported by the record. Article 5645 (Petition for Writ of Certiorari pp. 5-6) requires only such notice "as is reasonable and possible under the circumstances." This notice could have been oral, and, in fact, oral notice was given, in addition to the written notice, to Mr. Stuart an agent of Commodity (R. p. 278-279).

Also, the Record shows (R. p. 389-394, 435) and government counsel admit (Gov. Brief p. 6) that at the time in question CCC owed Mr. Shannon $41,111.17 storage charges on one bill he had sent them. Under Article 5645, R. C. S. of Texas, Mr. Shannon had a right to apply the *net proceeds,* after paying handling and shipping costs, to the satisfaction of this lien. Out of 41 cars of grain, selling mostly as poor sample grade, he scarcely could have realized enough to satisfy the lien which is admitted by the government (R. p. 106).

The statement of government counsel (Footnote 3, page 7, Gov. Brief) that petitioner was not convicted of stealing or converting "the relatively small amounts of grain damaged or spoiled" is not supported by the Record. We think the Record in this case clearly shows that at least 22,382,069 pounds of grain was lost through the June 4, 1951 flood and other unavoidable deterioration.[1]

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[1] From the Record p. 71 we get these figures:

1 warehouse		57,751 square feet
1 warehouse	100 ft. x 200 ft.	20,000 square feet
1 warehouse	100 ft. x 400 ft.	40,000 square feet
1 warehouse	100 ft. x 260 ft.	26,000 square feet
1 warehouse	100 ft. x 300 ft.	30,000 square feet
Total		173,751 square feet

Rotten Grain (R. pp. 200-228) 1.5 feet deep x 173,751 sq. ft. =260,626 cubic feet. Reduced to bushels, .8 x 260,626 cu. ft. = 208,500 bushels.

This figure of 22,382,069 lbs. destroyed by deterioration approximates the shortage which Mr. Bachmann, a government witness, says existed on June 3, 1951, just prior to the flood (R. p. 487), in amount of 22,456,532 lbs. If, in "reconstructing" his inventories by his "reverse method" (See Appendix "Y", p. 9, Petitioners Supplemental Brief) he started with such a shortage it would be reflected in every "reconstructed inventory." This being true, there was no appreciable shortage on June 3, 1951 as a matter of simple mathematics. In other words 22,456,532—22,382,069 = 74,463 lbs. which sum is less than one car of grain. The above figure does not take into account normal shrinkage, which undoubtedly caused several millions of pounds additional shortages.

Government counsel in their brief contend that the sales in May, June, and July 1951, the periods named in the indictment, were made by Mr. Shannon "when he was cognizant of a serious shortage" (Gov. Brief p. 8). This is not supported by the Record. Mr. Shannon filled all loading orders from CCC until he ran out of grain (R. p. 336). On August 20, 1951, according to the only CCC inventory ever

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Using same method used by Government Witness Mize (R. p. 451) we then multiply the number of bushels by 56 lbs. as follows: 56 lbs. x 208,500 bushels = 11,676,000 lbs. totally destroyed in the flood and thrown out on the ground (R. pp. 196-200) shortly after June 4, 1951.

17% total damage (R. p. 414) on 11,361,400 pounds of milo shipped in 1951 = 1,931,438 lbs. lost.

11.7% total damage to 5,020,400 lbs. of milo and Kaffir shipped in 1951 (R. p. 415) equals 587,386 lbs. lost.

4.2% total damage to 6,605,200 lbs. of milo shipped in 1950 (R. pp. 412-413) = 277,418 lbs. lost.

12.1% total damage to 3,387,000 lbs. of milo and Kaffir shipped (R. p. 413) = 409,827 lbs. lost.

A like set of facts and figures is available on wheat shipped (R. pp. 412-414).

75 cars out of 115 sample grade cars rejected as worthless by CCC (R. p. 437) in 1951 amounted to 75 x 100,000 lbs. (R. pp. 105-106) or 7,500,000 lbs. lost.

Total losses from these figures alone was 22,382,069 lbs.

made, and *long after the periods named in the indictment*, he had *not run out* of grain. On that date he still had 8,367,403 lbs. of milo and 15,696.28 bushels of wheat (R. p. 408).

Consequently, every element necessary under Art. 5645 R. C. S. of Texas is present in this case.

Not only that, but paragraph 10, of the contract (Supp. Record pp. 11-12) provides that the warehouseman shall be liable (civil liability is meant, we think) for deterioration of grain "only until the date he notifies Commodity" that the grain is going out of condition. If there is no civil liability there could be no criminal liability and the selling of such grain to prevent further loss after "reasonable and possible" notice would be a simple compliance with said Art. 5645. There could not, as a matter of law, be any *criminal intent* under such circumstances.

II

The *Uniform Storage Agreement* (Supp. R. p. 11) involved in this case was a *simple contract*, not within the Statute of Frauds, and could be, and was, amended or altered by parole.

This proposition was not mentioned in our original brief, and we bring it up here as an additional point to be considered in connection with our original Point II (Petitioner's Brief pp. 20-39).

III

Where the record shows, as in this case, that shortages charged against the accused were the result of an Act of God and other unavoidable deterioration (See note 1, *supra*), and that the "reverse method," described in our *Supplemental Brief on Petition for Certiorari*, was used to "reconstruct" inventories and it being a mathematical cer-

tainty that the final shortage of grain due to deterioration and shrinkage will follow through and reappear in each "reconstructed inventory," whether there was an actual shortage or not, there is no evidence to support a jury verdict of guilty. In this case, the amount of deterioration from flood and rot is so close to the amount of the "reconstructed inventory" of June 3, 1951, just before the Flood of June 4, as to make immediately apparent the fallacy of such evidence, as pointed out in our Supplemental Brief (See Note 1, *supra*).

As above pointed out, there was only 74,463 lbs. difference between the grain lost by deterioration as reflected by the Record and the "reconstructed inventory" of June 3, 1951 testified to by Mr. Bachmann. If we only use a fraction of one per cent to figure additional shrinkage, there would then be no difference. Then, if we refer to Appendix "X" and Appendix "Y" of Petitioners Supplemental Brief, we can easily see that the shortage due to deterioration is reflected almost to a pound in the June 3rd "reconstructed inventory"; which simply means, as a matter of simple mathematics, *that there was no shortage on June 3, 1951*, and that the total shortage, after June 4, whatever it may have been, was due to flooded and damaged grain. As pointed out above, after June 4 and after notice to CCC, Shannon had a right to sell the grain under Art. 5645 R. C. S. of Texas.

This shortage, when carried through "in reverse" would continue to show up in every "reconstructed inventory" until we got back to some period or other when Mr. Shannon was "long" by approximately 23,000,000 lbs. When that happens *he will appear* merely to be "even with the board" under Mr. Bachmann's method of computation.

It is clear that Mr. Shannon was, therefore, convicted

"without due process of law" in violation of the Fifth Amendment to the Constitution.

Dated the 1st day of May, 1954.

JAMES O. CADE,
Counsel for Petitioner.
KENNETH BOWLIN,
Of Counsel.

I hereby certify that the above petition for rehearing is presented in good faith and not for delay and that said petition is restricted to the grounds above specified.

Dated May 1, 1954.

JAMES O. CADE,
Counsel for Petitioner.

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